No. 76-1073

In the Supreme Court of the United States

OCTOBER TERM, 1976

CHARLES W. PARRISH, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1976, and a petition for rehearing was denied on January 4, 1977 (Pet. App. 4). The petition for a writ of certiorari was filed on February 3, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the district court abused its discretion in denying petitioner's post-sentence motion to withdraw his guilty plea.

STATEMENT

1. On January 6, 1976, an indictment filed in the United States District Court for the Eastern District of Virginia charged petitioner with three counts of making materially false statements in an application for a loan submitted to an institution insured by the Federal Deposit Insurance Corporation, in violation of 18 U.S.C. 1014. On February 13, 1976, pursuant to a plea bargain whereby the remaining counts of the indictment would be dismissed, petitioner sought to withdraw his plea of not guilty and to enter a plea of guilty to one count of the indictment.[1]

Before accepting the guilty plea, the district court conducted an inquiry as required by Rule 11, Fed. R. Crim. P. The court first ascertained that petitioner, a college graduate, understood that he was charged with "voluntarily and intentionally, and not because of mistake or accident or other innocent reason, making a materially false statement in an application for a loan submitted * * * to the Commonwealth Bank and Trust Company of Virginia * * *," by falsely stating in the application that he was the recipient of a $5,500,000 irrevocable spendthrift trust established by his mother, whom he alleged to be a DuPont family member (C.A. App. 28-29). Petitioner further acknowledged that he and his attorney had studied the nature of the charge and any possible defense that he might have to it and that he was aware that, if his guilty plea were accepted, he could be imprisoned for as long as two years and fined $5,000 (C.A. App. 29). The court then

[1]In return for the dismissal of the two counts, petitioner agreed to plead guilty to count one of the indictment, to appear before the grand jury and testify concerning the underlying facts of the case, and to testify at any subsequent trials to which he might be subpoenaed (C.A. App. 24-27). ("C.A. App." refers to the appendix to petitioner's brief in the court of appeals.)

advised petitioner that by pleading guilty he would waive certain constitutional rights, including trial by jury, the presumption of innocence, the requirement that the government prove his guilt beyond a reasonable doubt, the right to summon and cross-examine witnesses, and the privilege against self-incrimination. Petitioner replied that he understood these consequences and that his decision to plead guilty was not induced by threats or promises other than the terms of the plea bargain that had previously been described by the Assistant United States Attorney (C.A. App. 30-31).

At the court's request, the government attorney then summarized the evidence against petitioner, concluding by stating that "at that time [petitioner] submitted such application he knew so and did so with the intention of gaining the loan from the bank" (C.A. App. 33). Petitioner remarked that he did not disagree in any way with the government's recitation of the evidence, that he was making no claim of innocence, and that he understood that, if the court accepted his plea, there would be "no further trial of any kind" and he would be found guilty (C.A. App. 33-34). In light of the foregoing, the court concluded that the plea was voluntarily and knowingly made and had a basis in fact. It therefore accepted the plea to count one of the indictment (C.A. App. 34).

2. On March 12, 1976, when petitioner appeared for sentencing, his counsel offered the testimony of three witnesses, including Anne Rogers Devereux, in support of petitioner's request for leniency. Counsel explained that petitioner's wife had been hospitalized for a serious mental condition on numerous occasions and that, if petitioner were incarcerated, his wife might repeat previous attempts to commit suicide (C.A. App. 39). Counsel also

advised the court that petitioner had suffered serious financial setbacks and that his witnesses would testify that he made "the false statements which he has pled guilty to" in order to further a business proposition that, petitioner felt, would permit him to care for his family (C.A. App. 40). When the judge remarked that he did not believe that he should be influenced in his sentence by the possibility of the suicide of petitioner's wife, counsel responded (C.A. App. 41-42):

> It was offered in the sense that this is the family situation [petitioner] is in. It's a condition which existed at the time that he engaged in this offense. It goes partly to the reasons that he had for committing the offense.
>
> He is not attempting to exculpate himself by that. He is simply trying to, through me, to give Your Honor some idea of the family situation he is in * * *.

Petitioner's counsel then described in detail the background of the false loan application. Counsel stated that petitioner, who previously had been involved in the development of apartment dwellings and other types of real property, had been advised by an officer of the Commonwealth Bank that a trailer park was failing financially because its owners were utilizing funds from the operation of the park for other ventures. The bank officer suggested that petitioner might be able to help restructure the financing of the trailer park. According to petitioner's counsel, the false loan application that petitioner subsequently submitted to Commonwealth Bank was intended to secure funds to pay off arrearages in interest and principal owed to the bank by the previous owners of the trailer park (C.A. App. 42-44). Counsel added that "[t]here is no question that [petitioner] falsified his financial worth and made a false statement to the bank

in order to secure the loans, in an attempt to revive this business," and that "[t]here is no excusing what [petitioner] did in the sense that it was right or justified * * * " (C.A. App. 45, 46).

Finally, petitioner told the court that "I realize I made a terrible mistake, which I am certainly very sorry for" (C.A. App. 47). He was then sentenced to two years' imprisonment (C.A. App. 48).

3. On March 22, 1976, ten days after sentencing and after retaining new counsel, petitioner moved to withdraw his guilty plea pursuant to Rule 32(d), Fed. R. Crim. P. Petitioner contended that he had not fully understood the charge against him (*i.e.*, that the false statement in the application had to be material) and that he had a complete defense to the charge (*i.e.*, that he was acting merely as an agent for the Commonwealth Bank to permit the bank to cover from federal bank examiners the losses it had incurred on defaulted obligations arising out of the trust it held on the trailer park). Petitioner also alleged that he had been mentally incompetent at the time that he filed the application for the bank loan, because he had been subjected to extreme pressures brought about by his wife's mental illness and the sudden death of his stepdaughter from an overdose of drugs (C.A. App. 5-8). In support of this latter claim, petitioner submitted an affidavit from Mrs. Devereux, an old family friend who was neither a medical doctor, psychiatrist nor psychologist, which expressed her opinion that, as a result of family problems, petitioner had "lost all real ability * * * to control his acts or judgment" and that "he did not himself fully appreciate his mental impairment or what had happened or was happening to him, mentally" (C.A. App. 11).

On April 9, 1976, the district court held a hearing on petitioner's plea withdrawal motion.[2] The Assistant United States Attorney advised the court that, in addition to his admissions of guilt at the Rule 11 proceeding, petitioner had admitted every material allegation in the indictment in an interview in the United States Attorney's Office with his counsel present and had done so again when he testified before the grand jury (C.A. App. 72). The government attorney also observed that Mrs. Devereux was not a medical expert, that petitioner had not attempted to present psychiatric testimony in his behalf, and that petitioner had refused to waive the attorney-client privilege to allow his first attorney to testify about matters relevant to the motion to withdraw the plea. Finally, government counsel informed the court that petitioner's purported defenses were baseless and that the prosecution had had a number of witnesses who were prepared to testify at trial to refute those claims (C.A. App. 73-74).

The district court denied the motion to withdraw the guilty plea, finding that petitioner had not demonstrated that it would be manifestly unjust to hold him to his plea. The court ruled that petitioner's Rule 11 proceeding had been adequate, that petitioner had been represented by competent counsel and had freely admitted his guilt with knowledge of his possible defenses, and

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[2]The day before, April 8, 1976, the court had quashed subpoenas served by petitioner on the Attorney General, the Director of the Federal Bureau of Investigation, and the Commonwealth Bank, finding that the material sought to be presented would have no bearing on the question of whether "the plea was improvidentally [*sic*] entered, whether there is a substantial defense and whether manifest injustice would result if the plea is allowed to stand" (C.A. App. 59).

that petitioner's principal motivation for the plea withdrawal was not his innocence but rather his unhappiness with the sentence imposed (Pet. App. 5). The court of appeals affirmed *per curiam* (Pet. App. 1-3).

ARGUMENT

The court of appeals correctly concluded that the district court did not abuse its discretion in denying petitioner's post-sentence motion to withdraw his guilty plea. As noted above, the record of the Rule 11 proceeding established that petitioner understood the nature of the charges against him. See *Henderson* v. *Morgan*, 426 U.S. 637, 640 n. 6; *McCarthy* v. *United States*, 394 U.S. 459, 466. Petitioner acknowledged at the time of his plea that he had informed his attorney of all the facts known to him and that they had studied the "nature of the charge and any possible defense" he might have to it (C.A. App. 29). In addition, the court had expressly advised petitioner that he was charged with knowingly "making a *materially* false statement" (*id.* at 28; emphasis added) and petitioner had remarked that he did not disagree with the government's comment that the evidence would show that petitioner had made the false statements "[f]or the purpose of influencing the bank in [his] loan application" (C.A. App. 32, 33). Accordingly, as the court of appeals held, petitioner's plea "was voluntarily and intelligently made, with the aid of counsel and based on facts that support the charge" (Pet. App. 3).[3]

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[3]There is no reason to hold this case pending the outcome of *Blackledge* v. *Allison*, certiorari granted, No. 75-1693, October 4, 1976, or *United States* v. *Mayes*, pending on petition for a writ of certiorari, No. 76-989. The issue in those cases is whether a prisoner who moves to vacate his sentence on the ground that

Nor was petitioner entitled to withdraw his guilty plea on the basis of his allegation that he had a valid defense to the charge. As the District of Columbia Circuit has recently noted:

> Were mere assertion of legal innocence always a sufficient condition for withdrawal, withdrawal would effectively be an automatic right. There are few if any criminal cases where the defendant cannot devise some theory or story which, if believed by a jury, would result in his acquittal. A guilty plea is very typically entered for the simple "tactical" reason that the jury is unlikely to credit the defendant's theory or story. * * * Indeed, so long as a factual basis for the plea exists, * * * a court may accept such a "tactical" guilty plea even from a defendant who continues to assert his innocence. North Carolina v. Alford, 400 U.S. 25 (1970). Surely, such a defendant does not retain a right automatically to withdraw his plea. A guilty plea "frequently involves the making of difficult judgments." McMann v. Richardson, 397 U.S. 759, 769 (1970); *see also* Brady v. United States, 397 U.S. 742, 757 (1970).

United States v. *Barker*, 514 F. 2d 208, 221 (C.A. D.C.), certiorari denied, 421 U.S. 1013 (some citations omitted).

Here, faced with the overwhelming evidence of the falsity of the statements he made in his loan application and the likelihood of conviction on all three counts of the indictment, petitioner knowingly and intelligently

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his plea had been induced by threats and broken promises is entitled to an evidentiary hearing when his allegations are expressly rebutted by statements he made at the guilty plea proceeding. Here, petitioner was given a hearing on his motion to withdraw his plea of guilty.

chose to plead guilty to a single count and to cooperate with the government in the hope of receiving a minimal sentence. His disappointment with having received a sentence of two years' imprisonment does not constitute manifest injustice.[4]

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[4]In any event, petitioner's purported defenses to the indictment are insubstantial. Even if petitioner were correct in assuming that the bank did not rely on his false statements in approving the loan, his conduct would still have violated Section 1014 because the gravamen of that offense is the filing of a false statement "for the purpose of influencing in any way" the actions of the lending institution. *Kay* v. *United States*, 303 U.S. 1, 5-6; *United States* v. *Braverman*, 522 F. 2d 218, 223 (C.A. 7), certiorari denied, 423 U.S. 985; *United States* v. *Sabatino*, 485 F. 2d 540, 544 (C.A. 2), certiorari denied, 415 U.S. 948. Without supporting documentation for the substantial loan, federal bank examiners and, indeed, the bank's own auditors would have become suspicious. Accordingly, petitioner's false statements regarding his financial worth had the "capacity to influence" the lending institution. See *United States* v. *Braverman*, *supra*, 522 F. 2d at 223; *United States* v. *Tokoph*, 514 F. 2d 597, 603 (C.A. 10).

Similarly, even if the lay observations of Mrs. Devereux about petitioner's mental state at the time of the offense were accurate, petitioner does not allege that he suffered any mental incapacity at the time of his guilty plea. Moreover, any doubt concerning petitioner's criminal intent at the time of the loan application was dispelled at the sentencing hearing, when petitioner's counsel described the scheme that petitioner had devised, stated that he had discussed the events with petitioner, and admitted that petitioner had acted for the express purpose of reversing business losses he had suffered.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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